A

LIM BOON CHUAN v. WONDERFUL CASTLE SDN BHD (IN LIQUIDATION) & ANOR

COURT OF APPEAL, PUTRAJAYA
NALLINI PATHMANATHAN JCA
YAACOB MD SAM JCA
B RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-2016-11-2016]
23 APRIL 2018

C ***COMPANY LAW:*** *Winding-up – Liquidators – Removal of liquidator – Application by judgment creditor – Sale of land belonging to wound up company – Whether liquidator discharged duties in interest of company and all its contributors and creditors*

The appellant was one of the minority shareholder in the first respondent company ('the company'). The appellant had petitioned for the winding-up
D of the company. A winding-up order was made by the court and one Dato' Tee Guan Pian ('the liquidator') was appointed the company's liquidator at the choice of the appellant. The liquidator then advertised for the sale of the company's three parcels of land ('the subject lands'). On 1 October 2015, a meeting was held by the liquidator whereby the liquidator
E informed the meeting, *inter alia*, that (i) Tan Peng Son offered to buy the land at RM132,000,000; and (ii) a valuation report from MacReal International Sdn Bhd stated that the market value of the land was RM60 million. On 12 October 2015, the liquidator awarded the land to Steady Developments Sdn Bhd for RM132 million. On 13 November 2015 a sale and purchase
F agreement ('SPA') was executed with Steady Developments Sdn Bhd. In the High Court, the appellant sought the removal of the liquidator, the substitution of one Duar Tuan Kiat as liquidator and the setting aside of the SPA on the grounds that the liquidator: (i) had acted in contravention and/or in breach of his statutory and fiduciary duties; (ii) had acted
G unreasonably in failing to ascertain the true market value of the land; and consequently (iii) had failed to secure a fair market price for the subject lands. It was also submitted by the appellant there was a collusion between Tan Peng Son and the liquidator as Tan Peng Son was the majority shareholder and a director of the company as well as the purchaser, Steady Development.

H **Held (dismissing appeal with costs):**

(1) There was sufficient disclosure of Tan Peng Son's interests because Tan Peng Son annexed to the bid under Steady Development a statutory declaration disclosing his interest prior to the informal creditors' meeting on 1 October 2015. This afforded full and unqualified
I disclosure. Therefore, it could not be said that the transaction was being undertaken at less than an arm's length basis. (para 29)

(2) As for the sale price, the sum of RM132 million could not be categorically stated to be an undervalue or far below the fair market price for the subject lands because Emiprima's letter of 28 September 2015 merely stated that an adjacent land was sold at RM250,000 per acre. There were no other details or supporting documents to assist in supporting this assertion. Not much weight may be given to this valuation. The price at which the subject lands were transacted afforded a reasonable price which was not far short of the market value or an undervalue. On the contrary, looking at MacReal's objective and independent valuation, it appeared to have been sold at well above the market value. The contention of a sale at an undervalue, therefore, failed. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ialah salah satu pemegang saham minoriti dalam syarikat responden pertama ('syarikat'). Perayu telah memohon petisyen penggulungan syarikat. Perintah penggulungan dibuat oleh mahkamah dan seorang bernama Dato' Tee Guan Pian ('pelikuidasi') dilantik sebagai pelikuidasi syarikat atas pilihan perayu. Pelikuidasi kemudian mengiklankan jualan tiga bidang tanah syarikat ('tanah-tanah tersebut'). Pada 1 Oktober 2015, satu mesyuarat diadakan oleh pelikuidasi dan pelikuidasi memberitahu para hadirin mesyuarat, antara lain, bahawa (i) Tan Peng Son menawarkan untuk membeli tanah-tanah tersebut pada harga RM132,000,000; dan (ii) laporan penilaian MacReal International Sdn Bhd menyatakan bahawa nilai pasaran tanah-tanah tersebut adalah RM60 juta. Pada 12 Oktober 2015, pelikuidasi mengawardkan jualan tanah-tanah tersebut kepada Steady Developments Sdn Bhd pada harga RM132 juta. Pada 13 November 2015 satu perjanjian jual beli ('PJB') dilaksanakan dengan Steady Developments Sdn Bhd. Di Mahkamah Tinggi, perayu memohon penyingkiran pelikuidasi, menggantikan pelikuidasi dengan seorang bernama Duar Tuan Kiat sebagai pelikuidasi baru dan mengetepikan PJB atas alasan pelikuidasi: (i) telah melakukan kemungkiran dan/atau melanggar tugas statutori dan fidusiarinya; (ii) telah bertindak secara tidak munasabah kerana gagal menentukan nilai pasaran sebenar tanah-tanah tersebut; dan akibatnya (iii) gagal mendapatkan harga pasaran yang baik untuk tanah-tanah tersebut. Dihujahkan juga oleh perayu bahawa terdapat percanggahan antara Tan Peng Son dan pelikuidasi kerana Tan Peng Son ialah pemegang saham majoriti dan pengarah syarikat serta pembeli, Steady Development.

Diputuskan (menolak rayuan dengan kos):

(1) Terdapat pendedahan yang cukup tentang kepentingan Tan Peng Son kerana Tan Peng Son telah melampirkan dalam bidaan di bawah Steady Development satu pengisytiharan berkanun yang mendedahkan

minatnya sebelum mesyuarat pemiutang pada 1 Oktober 2015. Ini memberikan pendedahan penuh. Oleh itu, tidak boleh dikatakan bahawa urus niaga yang dijalankan tidak dijalankan secara tulus.

(2) Berkaitan harga jualan, jumlah RM132 juta tidak boleh dikategorikan sebagai jauh bawah harga kerana surat Emiprima bertarikh 28 September 2015 hanya menyatakan tanah bersebelahan dijual pada harga RM250,000 satu ekar. Tiada butiran lain atau dokumen sokongan untuk membantu menyokong dakwaan ini. Tidak banyak pemberatan boleh diberi pada penilaian ini. Harga di mana tanah-tanah tersebut diurusniagakan adalah harga yang berpatutan yang tidak jauh dari nilai pasaran. Sebaliknya, melihat objektif dan penilaian bebas MacReal, tanah-tanah tersebut dijual atas nilai pasaran. Oleh itu, hujahan bahawa jualan tersebut dibuat bawah harga pasaran gagal.

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 10 CLJ 7 HC ***(refd)***

North Plaza Sdn Bhd v. Equiticorp Holdings Ltd & Ors And Other Appeals [2013] 3 CLJ 1101 FC ***(refd)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 137, 218, 227, 233, 236(2)(c), (3), 241, 242
Companies (Winding-up) Rules 1972, r. 106

For the appellant - M Pathmanathan & Kalearasu Veloo; M/s SF Chan & Co
For the 1st respondent - Gopal Sri Ram, Kirubakaran, David Yee, Kevin Cheong; M/s The Chambers of Cheong
For the 2nd respondent - Eric Tan & Cynthia Liaw; M/s Ong Kok Bin & Co

[Editor's note: Appeal from High Court, Shah Alam; Petition Winding-up No: 28NCC-177-04-2015 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Nallini Pathmanathan JCA:

[1] These are our brief grounds of judgment in respect of this appeal. *Vide* this appeal the appellant, Lim Boon Chuan @ Lim Ban Huat ('appellant'), seeks to remove the very liquidator that he proposed for appointment, in Companies Winding Up Petition No: 28 NCC-177/04-2015. The appellant was the petitioner in that winding up.

[2] In the High Court, the appellant sought the removal of Dato' Tee Guan Pian ('the liquidator') under s. 137 of the Companies Act 1965 and the substitution of one Duar Tuan Kiat as liquidator. More importantly, the petitioner also sought the setting aside of a sale and purchase agreement dated 13 November 2015 entered into between the liquidator on behalf of the

company as vendor and one Steady Developments Sdn Bhd as purchaser in respect of three titles, namely GRN 46990, GRN 47648 and GRN 47993 comprising five parcels of land amounting to 852.6 acres. The basis for such removal were the allegations that: (i) the liquidator had acted in contravention and/or in breach of his statutory and fiduciary duties; (ii) had acted unreasonably in failing to ascertain the true market value of the land; and consequently (iii) had failed to secure a fair market price for the subject lands.

[3] The appellant also sought to contend that the liquidator had acted in collusion with the purchaser through Tan Peng Son ('TPS') to effect this sale to Steady Developments, the second respondent.

[4] For the liquidator, it was argued in rebuttal that the sale had been effected with full disclosure, that the highest bid was accepted, that too with the knowledge and consent of the creditors and contributories, and that the sale price was not at an undervalue premised on a contemporaneous and independent valuation undertaken. Therefore no possibility of collusion arose and the company had not suffered any loss by reason of the sale.

The Factual Matrix – Chronology Of Events

[5] The appellant is a minority shareholder, out of five other such shareholders who collectively hold 42.5% of the shares of the first respondent company. One other minority shareholder was Emiprima Sdn Bhd ('Emiprima').

[6] The six majority shareholders holding collectively 57.5% of the shares in the company are:

(i) Tan Peng Son (17.5%);

(ii) Chng Kiam Huat (20%);

(iii) Tan Eng Soi (2.5%)

[7] Tan Peng Son was the Managing Director. The appellant and one Lim Mei Hsia were amongst the other 12 directors of the company.

[8] The appellant petitioned for the winding up of the company on the ground that cash advances totalling RM5,327,167.09 made by him to the company were not re-paid and the statutory notice issued under s. 218 of the Companies Act ('the Act') 1965 was not met. The winding-up order was made on 14 August 2015 and one Tee Guan Pian was appointed the first respondent's liquidator. As stated at the outset, the liquidator was the appointee of choice of the appellant.

[9] (i) About three weeks after his appointment, that is on 7 September 2015, the liquidator advertised for the sale of the company's three parcels of land in two local publications namely the Star and Sin Chew Jit Poh. The land was planted with oil palm trees and also

built on the lands were an estate manager's bungalow, estate office, workers' quarters and a store. Machineries, equipment and office furniture were also kept on the land. The deadline for submission of the tender was on 28 September 2015.

(ii) On 28 September 2015, Emiprima wrote to the liquidator informing him that an adjacent land was transacted at RM250,000 per acre. (See Tab 22 of the Core Bundle of Documents, Vol 2).

A statutory declaration of Tan Eng Soi affirmed on 28 September 2015 (at pp. 1231 to 1232 of vol. 3/4 of the appeal records) stating that the directors of first and second respondents are the same persons, was attached to the tender of second respondent and submitted on the same day, ie, the last day for submission of the tender. In other words, the directors of the company in liquidation and the prospective purchaser was the same persons.

(iii) On 1 October 2015, an informal meeting was held by the liquidator which was attended by the appellant, Lim Mei Hsia, Tan Peng Son, Tang Eng Lor and Ching Kiam Huat, amongst others. (See Tab 35 of the Core Bundle of Documents, Vol. 2). The minutes of meeting disclose, *inter alia*, follows:

(a) The liquidator informed the meeting that he received six bids, the highest being RM131,000,000 submitted by one Fuji Trax Sdn Bhd;

(b) Tan Peng Son offered to buy the land at RM132,000,000. The last page of the minutes of meeting record that there were no objections by other contributors on the revised offer by Tan Peng Son. However the liquidator could not make a decision at that juncture due to the non-availability of the statement of affairs, which the Board of Directors had yet to submit to him;

(c) The appellant however alleged that he was verbally abused and threatened with physical harm by Tan Peng Son at the meeting when he raised objections about the sale;

(d) The valuation report dated 7 October 2015 from MacReal International Sdn Bhd (at pp. 634-671 of the appeal record, Vol. 2/4) stated that the market value of the land is RM60 million. An earlier report dated 25 March 2015 from the same valuer who was appointed by OCBC Bank (enclosed at pp. 830-868 of the appeal records, Vol. 3/4) recorded the same market value.

[10] On 12 October 2015 the liquidator awarded the land to the second respondent, Steady Developments Sdn Bhd for RM132 million. (See Tab 35 of the Core Bundle Vol. 2/4 – Minutes of Meeting dated 31 March 2016.)

[11] On 16 October 2015 the statement of affairs was submitted to the liquidator.

[12] The letter dated 27 October 2015 from the appellant's solicitor requested for an update on the sale of the land (enclosed at p. 701 of the appeal records, Vol. 2/4, Part C).

[13] The appellant's solicitors' letter dated 5 November 2015 requested further information about the buyer, which was disclosed by the liquidator during the informal meeting. (See Tab 8 of the Core Bundle, Vol. 1).

[14] The appellant's solicitors' letter dated 13 November 2015 requested that the sale be expeditiously concluded and that no extension of time was to be given for payment (See Tab 8 of the Core Bundle, Vol. 1.)

[15] On 13 November 2015 a sale and purchase agreement was executed with Steady Developments Sdn Bhd and the RM13.2 million deposit was collected by liquidator. Among the terms of the sale and purchase agreement were that:

(i) The consent to transfer from the Estate Board was to be submitted by the vendor.

(ii) The lawyer for the liquidator was to apply to remove the caveat and discharge the charge lodged by OCBC Bank over the lands.

[16] On 18 November 2015 the appellant's solicitors were informed of the sale and purchase agreement with Steady Developments Sdn Bhd.

[17] On 30 December 2015 the stamped copy of the sale and purchase agreement was forwarded to the appellant.

[18] On 28 January 2016, the charge was discharged.

[19] On 8 March 2016, the private caveat was removed.

[20] On 11 March 2016 the application for consent to the Estate Board was made. However, the application to the Estate Board was rejected *vide* letter dated 18 October 2016 (see Tab 38 of Core Bundle, Vol. 2, a letter from the Chambers of Cheong).

[21] At the Creditors' Meeting of the first respondent company held on 31 March 2016, Ernest Cheong acted as the appellant's proxy.

[22] On 25 April 2016, Ernest Cheong provided a valuation of RM210 million (at pp. 465 to 567 of the appeal records vol. 2/4).

[23] On 4 May 2016 the notice of motion to remove the liquidator was filed.

[24] It is to be noted that on 9 June 2015 the appellant's solicitors sent an email which forwarded the draft sale of shares agreement (for appellant to sell all his shares in the first respondent to Ching Kiam Huat, the other majority shareholder), and in that email the value of the land is stated as RM61,727,802 (at p. 878 of the appeal records, Vol. 3/4).

A **Issues In The Appeal**

[25] In considering whether there was sufficient basis for the removal of the liquidator, the following issues arose for consideration in this appeal:

(a) Whether the liquidator in the conduct of the liquidation namely the sale
B of the subject lands, acted in contravention of various sections of the Companies Act 1965?

(b) Whether the sale was undertaken at an undervalue?

(c) Whether the sale was effected in the best interests of the company?

C (d) Whether there was collusion between the creditor and majority shareholder/contributory of both the company, and Steady Developments Sdn Bhd, namely Tan Peng Soon and the liquidator?

Issue (a): Whether The Liquidator In The Conduct Of The Liquidation, Namely The Sale Of The Subject Land, Acted In Contravention Of Various Sections Of The
D *Act?*

[26] In summary, it was contended by learned counsel for the appellant that there were several breaches of the Act in relation to the conduct of the liquidation. These breaches included the following matters:

E (i) That the liquidator did not call for a formal creditors' meeting to get their consent or that of the creditors within 21 days from the date of the winding up in contravention of r. 106 of the Companies Winding-up Rules 1972. However, a perusal of the two provisions namely r. 106 and s. 227 discloses that this first meeting of creditors and contributories is
F necessary in order to determine whether the liquidation is to be undertaken by the official receiver or a liquidator. In the instant case, the liquidator was appointed on winding up so there was no necessity for such a meeting to be convened. There is therefore no breach of r. 106 or s. 227 of the Act;

G (ii) That the liquidator did not form a Committee of Inspection thereby contravening ss. 241 and 242 of the Act. However a perusal of those sections discloses that a Committee of Inspection ('COI') is only formed if the creditors or members request the same. Generally, such a COI is necessary where there are a large number of creditors and the numbers
H are too unwieldy to warrant attendance by all creditors on each occasion. In the instant case, there was no request, so there was no necessity to form a COI. It is not a mandatory requirement and therefore there is again, no breach of ss. 241 or 242 of the Act;

(iii) It was contended that there was a failure to procure an order of court
I to vest the subject lands in the liquidator and that this too amounted to a breach of s. 233. However s. 233 does not make it mandatory that the subject lands must be vested in the liquidator before any sale can be

effected. It is in order for the liquidator to facilitate a sale by the company in liquidation. Therefore there is no breach of s. 233 of the Act;

(iv) It was next submitted that the liquidator had failed to obtain the approval or sanction of the court as required under s. 236(3). However we could not concur with this submission because it is apparent from s. 236(2)(c) that the liquidator is at liberty to sell the subject lands without resort to court for leave. (see *Abric Project Management & Anor v. Palmshine Plaza Sdn Bhd Sdn Bhd* [2007] 10 CLJ 7; [2007] 5 MLJ 685 and *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785). It is the primary duty of the liquidator to realise the assets of the company in the best interests of the unsecured creditors. Accordingly this alleged contravention also fails. The case of *North Plaza Sdn Bhd v. Equiticorp Holdings Ltd & Ors And Other Appeals* [2013] 3 CLJ 1101, which is a Federal Court decision, was cited in support of this submission. However, that case dealt with the purpose and significance of a COI where such a committee has been appointed. In such a case, the liquidator is bound to act in accordance with the directions and wishes of the COI. That is not the case here. We have also explained that the appointment of a COI is not mandatory;

(v) Significantly, the cited case is authority for the proposition that the exercise of the power of sale by a liquidator is always subject to the control of the court under s. 236(3). However, this cannot equated with a mandatory requirement that leave of court or sanction is necessary before a liquidator carries out his primary duty of realising assets, in this case the sale of the subject lands;

(vi) It was also submitted for the appellant that there was sufficient evidence before the court for it to infer that there was collusion between Tan Peng Son and the liquidator. Tan Peng Son is the majority shareholder and a director of the company as well as the purchaser, Steady Development.

[27] As set out above, it is evident that on the date of the informal creditors' meeting on 1 October 2015, when the liquidator disclosed the quantum of all the bids to the creditors, it was Tan Peng Son who offered to purchase the subject lands at a price of RM1 million higher than the highest bidder, Fujitrax Sdn Bhd.

[28] The suggestion is that this bid, which was accepted by the liquidator as it was the highest, is tainted because of:

(a) Tan Peng Son's common shareholding in the vendor and within the purchaser;

(b) The quantum of Tan Peng Son's bid falls far short of the market price prevailing;

(c) The failure of the liquidator to go back to Fujitrax to procure a higher bid despite stating that he would do so;

(d) The valuation report from Ernest Cheong valuing the land at RM231 million.

[29] We have given anxious consideration to this grave allegation but are constrained to conclude that there is simply insufficient evidence to bear out this allegation of collusion for the following reasons:

(i) We are cognisant of the position of Tan Peng Son as a majority shareholder in the company and as a director of the same.

(ii) We also appreciate that as the majority shareholder and director of Steady Development, the purchaser, Tan Peng Son will be acquiring the most substantial and valuable asset of the company.

(iii) However, the most important consideration to our minds that arises in determining whether there is any conflict or prejudice to the company or its unsecured creditors is whether there was sufficient disclosure of Tan Peng Son's interests and whether the price at which the acquisition was made is a reflection of the fair market value. We are satisfied that this is the case because Tan Peng Son annexed to the bid under Steady Development a statutory declaration disclosing his interest prior to the informal creditors' meeting on 1 October 2015. This is what he said: "I am a substantial shareholder of Steady Developments … I am both a director and contributory of Wonderful Castle". To our minds this afforded full and unqualified disclosure.

(iv) We are also not aware of any authority prohibiting a contributory and a creditor from bidding in such a tender exercise provided there is full disclosure.

(v) Therefore, it cannot be said that the transaction was being undertaken at less than an arm's length basis.

[30] As for the sale price, we are also satisfied that the sum of RM132 million cannot be categorically stated to be an undervalue or far below the fair market price for the subject lands. This is because:

(i) An independent valuation undertaken by MacReal International Sdn Bhd ('MacReal') on 25 March 2015 at the behest of OCBC Bank valued the land at RM60 million;

(ii) It was not unreasonable for the liquidator to have utilised this report as a guide for the valuation of the land in September and October 2015;

(iii) This was fortified by the second report by MacReal on 7 October 2015 where the valuation was again RM60 million. As this valuation was undertaken by an independent party and an independent valuer, it is an objective assessment of the value of the land.

(iv) Emiprima's letter of 28 September 2015 merely states that an adjacent land was sold at RM250,000 per acre. This amounts to approximately RM231 million for the subject lands as a whole. However, there are no other details or supporting documents to assist in supporting this assertion. Therefore not much weight may be given to this valuation;

(v) Ernest Cheong's valuation is RM210 million but it was undertaken almost one year after the execution of the Sale and Purchase Agreement in April 2016, at the behest of the appellant here. It is also pertinent to note, as mentioned earlier, that Ernest Cheong was the appellant's proxy at the creditor's meeting of the company on 31 March 2016. This valuation was also obtained shortly before the filing of the motion for the removal of the liquidator. To that extent, we are not satisfied that it is an entirely objective valuation.

(vi) Taken in totality therefore, we are persuaded that the price at which the subject lands were transacted affords a reasonable price which is not far short of the market value or an undervalue as asserted by the appellant. On the contrary looking at MacReal's objective and independent valuation, it appears to have been sold at well above the market value. The contention of a sale at an undervalue therefore fails.

[31] In conclusion, having painstakingly gone through the entirety of the grievances put forward by the appellant, we are satisfied that there is insufficient basis to warrant the removal of the liquidator. The appeal is therefore dismissed with costs.

[32] By way of postscript we have considered the post-sale events and are of the view that they are not directly relevant to the issues at hand.